

**STATE OF WISCONSIN
SUPREME COURT
Case No. 99-3297-OA**

EMPLOYEE TRUST FUNDS BOARD, THE
DEPARTMENT OF EMPLOYEE TRUST FUNDS
and ERIC O. STANCHFIELD, Secretary of the
Department of Employee Trust Funds,

Petitioners,

STATE ENGINEERING ASSOCIATION, by
its President, THOMAS H. MILLER, DAVID
BUSCHKOPF, ROSS JOHNSON, MELVIN
SENSENBRENNER, BERNARD KRANZ and
THOMAS H. MILLER,

Proposed Intervening Petitioners,

v.

GEORGE LIGHTBOURN, Acting Secretary of
the Wisconsin Department of Administration,
JACK C. VOIGHT, Wisconsin State Treasurer,
WISCONSIN EDUCATION ASSOCIATION
COUNCIL, by its President, TERRY CRANEY
and its Vice-President, STAN JOHNSON, and
DONALD KRAHN, MARGARET GUERTLER,
GERALD MARTIN, and PHYLLIS POPE,

Respondents.

COMPLAINT

NOW COME the above named Proposed Intervening Petitioners, by their attorneys, Haus, Resnick and Roman, LLP, by William Haus and Michael E. Banks, and allege as follows:

PARTIES

1. Petitioner, State Engineering Association (“SEA”) is a labor organization and representative of employees within the meaning of § 111.81(12) and (17), Wis. Stats. respectively and represents the approximately 1,300 employees included in the engineering bargaining unit referred to in § 111.825(1)(f)8, Wis. Stats.; its principal offices are located at 4510 Regent Street, Madison, Wisconsin 53705.

2. Petitioner, Thomas H. Miller, is an adult resident of the State of Wisconsin; he is currently President of the State Engineering Association, serves on its Board of Directors, and is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the Wisconsin Retirement System; his current address is 810 South Grand Avenue, Waukesha, Wisconsin 53186.

3. Petitioner, David Buschkopf, is an adult resident of the State of Wisconsin; he is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a

participant in the Wisconsin Retirement System; his current address is 1302 Pioneer Road, Watertown, Wisconsin 53098.

4. Petitioner, Ross Johnson, is an adult resident of the State of Wisconsin; he is employed by the State of Wisconsin in a position that is included in the bargaining unit represented by the State Engineering Association; he is a participant in the Wisconsin Retirement System; his current address is 327 Roosevelt Avenue, Eau Claire, Wisconsin 54701.

5. Petitioner, Melvin Sensenbrenner, is an adult resident of the State of Wisconsin; he was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the Wisconsin Retirement System; his current address is 4701 Goldfinch Drive, Madison, Wisconsin 53714.

6. Petitioner, Bernard Kranz, is an adult resident of the State of Wisconsin; he was employed by the State of Wisconsin in a position that was included in the bargaining unit represented by the State Engineering Association until his retirement, and is an annuitant of the Wisconsin Retirement System; his current address is 2425 George Street, LaCrosse, Wisconsin 54603.

7. Respondent, George Lightbourn,, is the Acting Secretary of the Wisconsin Department of Administration, whose current office address is 101 East Wilson Street, 10th Floor, Madison, Wisconsin 53702.

8. Respondent, Jack C. Voight, is the Wisconsin State Treasurer, whose current address is 1 South Pinckney Street, 5th Floor, Madison, Wisconsin 53703.

BACKGROUND

9. The Wisconsin Retirement System (hereafter referred to as the "WRS") is a system for providing benefits as provided in Ch. 40, Wis. Stats. The WRS is administered by the Employee Trust Funds Board (the "ETF Board") and its appointed Secretary of the Department of Employee Trust Funds ("DETF").

10. As provided in § 40.01(1) and (2), Wis. Stats., the public employee trust fund (hereinafter also referred to as the "Fund") was created for the purpose of aiding public employees in protecting themselves and their beneficiaries against the hardships of old age, disability, death, illness and accident. Pursuant to statute, it is a public trust to be " ...managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan, including amounts allocated under s. 20.515 (1) (um) or (ut) or 40.04 (2), and shall not be used for the purposes of any other benefit plan. All statutes relating to the fund shall be construed liberally in furtherance of the purposes set forth in this section."

11. Under § 40.19(1), Wis. Stats., "[r]ights exercised and benefits accrued to an employe under this chapter [(chapter 40)] for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act."

12. The monies held in the Fund are not state funds. The monies in the Fund have been irrevocably placed in trust for the benefit of WRS participants and the State cannot direct the use of such money for non-Trust purposes.

13. WRS participants have a property interest and contractual right in the proper use of the assets and earnings of the Fund. The legislature is not free to spend or appropriate the assets or earnings of the Fund. except in a manner and for the purposes authorized by statute relating to the WRS. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558-59, 544 N.W.2d 888, 892 (1996).

14. When an exclusive grant of discretionary authority has been given statutorily to the ETF Board, the WRS participants have a property interest in the preservation of the ETF Board's authority. Retired Teachers Ass'n v. The Employee Trust Funds Bd., 207 Wis. 2d 1, 20, 558 N.W.2d 83, 91 (1997).

15. WRS Participants have a contractual relationship with the state and a vested right in the WRS. The WRS participants' property right extends to the WRS as a whole. *Id.* at 19. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 558, 544 N.W.2d 888, 892 (1996).

16. "Governmental takings do not become exempt from due process requirements simply because they may be actuarially insignificant. ... The gravity of a property deprivation is irrelevant to the question of whether such rights are violated without due process. *Id.* at 560. Any pension plan's ability to meet its obligations can be jeopardized when funds are taken from it, since every dime is arguably part of a management strategy dependent upon spreading the fund's monies as broadly as possible." *Id.* "While the specific transfer of trust funds ... may not immediately threaten the benefits of vested ... beneficiaries, the precedent set by such a transfer certainly could." *Id.* at 562.

17. Legislative intervention into the Fund is only constitutional in limited circumstances such as "when it is necessary to preserve the actuarial soundness of a plan or to salvage financially troubled funds." To be constitutional, legislative intervention must be reasonable, "needed" and "necessary to protect actuarial soundness." *Id.* at 563-64.

18. Participants in the WRS are entitled to defined benefits calculated as a formula involving their final average monthly earnings multiplied by their years of creditable service. Different percentage multipliers are used for calculating the benefits to be paid to different groups of participating employees.

19. Employees and employers participating in the WRS pay a percentage of payroll as a defined contribution into the Fund. Sections 40.05(1) and (2), Wis.

Stats. Individual accounts are maintained for each non-annuitant participant, interest is credited to those participant accounts, and there is a guarantee that the minimum annuity benefit will equal the sum of the participant's accumulated additional and required contributions plus an amount from the employer accumulation reserve equal to the participant's accumulated required contributions. Section 40.23(3), Wis. Stats.

20. Within the Fund, there is a fixed retirement investment trust ("FRIT"), which is a pooled fund consisting of contributions made by and on behalf of participants. The FRIT receives funds from three sources: (1) contributions from participating employees; (2) contributions from participating employers; and (3) investment earnings on employee and employer contributions.

21. Within the FRIT, there are a number of accounts relevant to this proceeding. These accounts include:

- A. An employee accumulation reserve account which holds funds related to employee contributions. Section 40.04, Wis. Stats.
- B. An employer accumulation reserve account which holds funds related to employer contributions. Section 40.04(5), Wis. Stats.
- C. An annuity reserve account. When a participating employee retires and elects to take an annuity, an amount sufficient to

fund his or her annuity is transferred from the employer and employee reserves into the annuity reserve. Section 40.04(6), Wis. Stats.

- D. The Transaction Amortization Account ("TAA"). Section 40.04(3), Wis. Stats. The TAA is an accounting device for calculating and adjusting investment gains that are not yet realized. One of the major purposes of the TAA is to smooth out the effects of swings in the unrealized gains and losses in the FRIT, and to thereby improve equity among WRS participants in the effects of investment gains and losses on their retirement accounts. Every year, the FRIT is credited with 20% of the TAA balance. This 20% amount is divided proportionally among the FRIT's three reserve accounts.

22. Each WRS participant has a separate account maintained in the employee accumulation reserve within the FRIT. Section 40.04(4)(a), Wis. Stats.

23. The employer accumulation reserve is a pooled fund that is maintained without regard to the identity of any individual employer. Individual accounts are not maintained in the employer accumulation reserve. Section 40.04(5), Wis. Stats.

24. Funds in the employer accumulation reserve may only be used to fund benefits to WRS participants and their beneficiaries. Such benefits can only be provided in accordance with the requirements of ch. 40 of the Wisconsin Statutes. Employers do not have any vested interest in the funds in the employer accumulation reserve or any other funds in the WRS. WRS participants and their beneficiaries have both property rights and contractual rights in the funds in the employer accumulation reserve and all other funds in the WRS. Retired Teachers Ass'n v. The Employee Trust Funds Bd., 207 Wis. 2d 1, 19, 558 N.W.2d 83, 91 (1997).

25. In addition to the required annual employer contributions, employers are required to pay contributions for any unfunded prior service liability that is owed to the WRS. Such unfunded prior service liability arises from such occurrences as past benefit improvements under the WRS that were not fully funded at the time of their creation, and for recognizing service of employees rendered prior to the employer becoming a covered employer under the WRS. Employer contribution rates for unfunded prior service liability are paid on a 40-year amortization. Section 40.05(2)(b), Wis. Stats. Each employer is statutorily required to continue making contributions toward the employer's unfunded service liability until such liability is paid in full. Section 40.05(2)(bm), Wis. Stats.

26. Respondent Voight is the treasurer of the Fund. Section 40.03(4), Wis. Stats.

27. The Board is required to select and retain the actuary or actuarial firm which shall perform all actuarial services necessary for the operation and control of the Fund. Section 40.03(1)(d), Wis. Stats. Contribution rates and actuarial assumptions determined by the actuary, including the assumed interest rate and the assumptions for future changes in employee salary rates, are subject to approval of the Board. Section 40.03(1)(e), Wis. Stats. These actuarial assumptions determine employee and employer contributions to the Fund and are to be based on the actual experience of the WRS, unless lack of adequate information or unusual circumstances are specifically identified and fully described which require use of other groups' experience and such other experience is not inconsistent with the WRS's own experience. Section 40.03(5)(b), Wis. Stats.

OPERATIVE FACTS

28. AB 495 was passed in both the Assembly and Senate on October 6, 1999.

29. AB 495 provides that, on December 31, 1999, \$4 Billion is to be distributed from the TAA to the reserves and accounts of the FRIT in an amount equal to a percentage of the total distribution determined by dividing each reserve's and account's balance on the prior January 1 by the total balance of the FRIT on the prior January 1.

30. The \$4 Billion recognized from the TAA pursuant to AB 495 is not for the purpose of smoothing the recognition of investment gains and losses or to achieve equity among WRS participants in the effects of investment gains and losses on their retirement accounts. Such funds are being used to fund benefits created by AB 495 and to reduce the obligations of participating employers who have no beneficial interest in the assets or earnings of the WRS.

31. AB 495 provides that \$200,000,000 of the increase in the fixed employer accumulation reserve that results from the distribution of \$4 Billion from the TAA will be used to establish contribution credits for payments for employers that have unfunded prior service liability under the WRS. For those employers that do not have unfunded prior service liability, the credits will be used to make payments for their required employer contributions under the WRS. During the period in which the credits are used, the employers that have unfunded prior service liability will not be required to make payments for unfunded prior service liability, and those employers that do not have unfunded prior service liability will not be required to make employer-required contributions. After an employer's credits are consumed, the employer is required to resume making required employer contributions. AB 495, Sections 27(1)(a) and (b)1.

32. As part of the \$4 Billion TAA transfer, approximately \$647 Million is being used to make a direct payment of Fund monies to employers. To achieve its

goal of diverting \$200 Million of the amount deposited into the employer accumulation reserve to pay for unfunded prior service liability and required employer contributions as provided in AB 495 Sections 27(1)(a) and (b)(1), the legislature reverse engineered the amount of money that would have to be deposited in all three accounts to generate the \$200 Million employer credit account. The amount required to generate the \$200 Million employer credit account is approximately \$647 Million.

33. The funds in the employer accumulation reserve are for the exclusive purpose of paying participant benefits. Section 40.04(5)(c), Wis. Stats. The employer credit account of \$200 Million is a diversion of Fund monies for non-Trust purposes, and is for the exclusive benefit of employers who have no right or entitlement to the assets of the WRS.

34. AB 495 increases the percentage multipliers used in calculating a participant's annuity for creditable service that is performed before January 1, 2000. For a protective occupation participant who is covered by Social Security, an elected official and an executive participating employee, the percentage multiplier is increased from 2% to 2.165%. For a protective occupation participant who is not covered by Social Security, the percentage multiplier is increased from 2.5% to 2.665%. For all other participants in the WRS, the percentage multiplier is increased from 1.6% to 1.765%. The increase in the percentage multiplier first applies to the

calculation of retirement benefits for individuals who are participating employees in the WRS on January 1, 2000. For all creditable service performed on or after January 1, 2000, AB 495 provides that the current law percentage multiplier will apply. AB 495, Sections 17-20.

35. To the extent the increased percentage multipliers are funded by the \$4 Billion transfer from the TAA, the resulting increase in benefits is not being funded with state funds. In addition, the \$4 Billion is not being shared equitably by WRS participants. Those participants with longer creditable service as of January 1, 2000 will receive more of the \$4 Billion by virtue of the formula increase, which is not consistent with the TAA's purpose to promote equitable sharing of gains and losses in the Fund, rather than having the recognition of gains or losses concentrated in any one year.

36. Under current law, employee and employer contributions to the fund are based on certain assumed interest rates and salary increases. The assumed interest rate set by statute is 7.5%, and the assumed salary increases are set at 1.9% less than the assumed rate. Section 40.02(7), Wis. Stats. The Board may approve different rates based on the the recommendations of the actuary designated by the Board. *Id.*

37. AB 495 increases the assumed interest rate to 8%, and increases the differences between the assumed salary increases and the assumed interest rate to

3.4%. Although AB 495 leaves in place the ability of the Board, on recommendation of the actuary, to approve a different rate "due to changed economic circumstances," it directs that the mandated assumptions be used "for the 2001 calendar year." AB 495 Sections 5 and 28(1). These provisions of AB 495 limit the discretion of the Board in the following respects:

- A. The discretion of the board to change the assumed interest rate based on the recommendation of the actuary is completely removed for time periods following the effective date of AB 495 through the expiration of the 2001 calendar year.
- B. After the 2001 calendar year, the discretion of the Board to change the assumed interest rates based on the recommendation of the actuary from those imposed by AB 495, is limited to where such change is "based upon changed economic circumstances."

38. The increase in the spread between assumed salary increases and assumed interest rates results in a decrease in the contributions made to the Fund, thereby posing a potential threat to the actuarial soundness of the Fund. The actuary did not recommend these assumption changes, and the Board did not approve these changes.

39. AB 495 increases the maximum amount of an initial annuity for a WRS participant who receives an annuity that is calculated using the formula multiplier, other than a protective occupation participant, by 5% of the participant's final average earnings. AB 495, Section 16. As of December 31, 1998, 17,609 active WRS participants were protective occupation participants.

40. By Order dated December 29, 1999, the Wisconsin Supreme Court preliminarily enjoined implementation or enforcement of AB 495 and AB 584.

CAUSES OF ACTION

41. The use of \$647 Million to achieve the goal of diverting \$200 Million of the amount deposited into the employer accumulation reserve to pay for unfunded prior service liability and required employer contributions, as provided in AB 495 Sections 27(1)(a) and (b)(1), is an improper use of the Fund's investment earnings. The use of the Fund's investment earnings in this manner is unlawful in the following respects:

- A. It violates Section 40.19, Wis. Stats.;
- B. It is a taking of WRS participants' property without due process of law and without just compensation in violation of art. I, § 13 of the Wis. Const. and amends. 5 and 14 of the U.S. Const.; and

- C. It constitutes an impairment of contract in violation of art. I, § 12 of the Wis. Const. and art. I, § 10, cl. 1 of the U.S. Const.

42. The changes in assumptions of Section 40.02(7), Wis. Stats., required by AB 495 Section 5, constitutes a usurpation of the Board's discretion and is unconstitutional. Retired Teachers Ass'n v. The Employee Trust Funds Bd., 207 Wis. 2d 1, 20, 558 N.W.2d 83, 91 (1997). These changes in assumptions are unlawful in the following respects:

- A. They violate Section 40.19, Wis. Stats.;
- B. They are a taking of WRS participants' property without due process of law and without just compensation in violation of art. I, § 13 of the Wis. Const. and amends. 5 and 14 of the U.S. Const.; and
- C. They constitute an impairment of contract in violation of art. I, § 12 of the Wis. Const. and art. I, § 10, cl. 1 of the U.S. Const.

43. The recognition of \$4 Billion from the TAA under AB 495 is unlawful in the following respects:

- A. It violates Section 40.19, Wis. Stats.;

- B. It is a taking of WRS participants' property without due process of law and without just compensation in violation of art. I, § 13 of the Wis. Const. and amends. 5 and 14 of the U.S. Const.; and
- C. It constitutes an impairment of contract in violation of art. I, § 12 of the Wis. Const. and art. I, § 10, cl. 1 of the U.S. Const.
- D. It constitutes the unlawful use assets of the WRS, which are not state funds, for the purpose of funding a grant of extra compensation in violation of Wis. Const. Art. IV, § 26.

44. The \$4 Billion TAA transfer, changes in the assumed interest and salary rates and the \$647 Million transfer used to create the \$200 Million employer credit account were not "needed" or "necessary to preserve the actuarial soundness of [the WRS] or to salvage financially troubled funds," and, therefore, are unconstitutional. Association of State Prosecutors v. Milwaukee County, 199 Wis. 2d 549, 563-64, 544 N.W.2d 888, 894 (1996).

45. AB 495 providing for and funding an increase in the formula multiplier for creditable service prior to January 1, 2000, without providing for state funding for such increased benefits, violates Wis. Const. Art. IV, § 26.

WHEREFORE, Petitioners demand judgment as follows:

1. Declare that AB 495, Sections 27(1)(a) and (b) are invalid and unconstitutional, and that they violate Petitioners' contractual and property rights.
2. Declare AB 495, Section 5 unconstitutional to the extent it changes the assumed rates set forth in Section 40.02(7), Wis. Stats.
3. Declare that AB 495 providing for and funding an increase in the formula multiplier for creditable service prior to January 1, 2000, but failing to provide state funding for such increased benefits, violates Wis. Const. Art. IV, § 26.
4. Sever the invalid and unconstitutional provisions of AB 495 from those that are valid, and permanently enjoin the implementation of the invalid and unconstitutional provisions.
5. Order that Respondents pay Petitioners costs, attorney fees and disbursements.
6. Such other and further legal and equitable relief as the court deems just and proper.

Dated at Madison, Wisconsin, this 28th day of January, 2000.

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